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84-1851
No. A-800

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1984

EDGAR HARDIN GILLOCK,

PETITIONER

vs.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Sixth Circuit's finding of misjoinder requires reversal of defendant Gillock's conviction.

(2) Whether the Sixth Circuit's decision in the case before this court can be reconciled with the Eighth Circuit's ruling in United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) and, if not, which ruling is correct.

(3) Whether reversal of a conspiracy conviction due to a fatal variance between the indictment and the proof offered at trial requires reversal of remaining convictions which were based in large part on alleged co-conspirators' hearsay statements erroneously admitted under FRE 801(d)(2)(E).

B. PARTIES TO THE PROCEEDING

At trial, W. Hickman Ewing, United States Attorney, and Michael C. Speros, Assistant United States Attorney, represented the United States of America. Mr. Ewing and Mr. Speros also represented the government on appeal.

At trial, James D. Causey served as lead defense counsel for Edgar H. Gillock. Jay Fred Friedman served as associate defense counsel. Mr. Causey and Mr. Friedman represented Mr. Gillock through the appeal to the Court of Appeals for the Sixth Circuit with Mr. Friedman serving as lead counsel.

Both at trial and on appeal, Henry L. Klein represented co-defendant, Allan Harvey Bibby. Mr. Klein has filed a Petition for Writ of Certiorari on Mr. Bibby's behalf.

At trial, William L. Harper and Edwin L. Hoffman represented co-defendant, A.

Arthur Ayers. On appeal to the Sixth Circuit, Andrew J. Ekonomou and Kirby G. Atkinson represented Mr. Ayers.

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D. REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has been published in the Federal Reporter, 2d Series, styled United States v. Bibby, et al, 752 F.2d 1116 (6th Cir. 1985).

E. JURISDICTIONAL STATEMENT

(1) The judgment sought to be reviewed was decided and filed January 14, 1985.

(2) The Court of Appeals for the Sixth Circuit denied Gillock's petition for rehearing en banc by order dated March 1, 1985. By order dated April 22, 1985, Justice O'Connor granted an extension of time within which to petition for certiorari, to and including May 30, 1985.

(3) The petitioner anticipates no cross-petition for certiorari.

(4) The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

F. RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

(1) 18 U.S.C. §2 - reprinted as Appendix C

(2) 18 U.S.C. §371 - reprinted as Appendix D

(3) 18 U.S.C. §1341 - reprinted as Appendix E

(4) 18 U.S.C. §1343 - reprinted as Appendix F

(5) 18 U.S.C. §1951 - reprinted as Appendix G

(6) 26 U.S.C. §7201 - reprinted as Appendix H

(7) Federal Rules of Criminal Procedure 8 - reprinted as Appendix I

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(10) Federal Rules of Evidence 611(a) - reprinted as Appendix L

(11) Federal Rules of Evidence 801 (d)(2)(E) - reprinted as Appendix M

G. STATEMENT OF THE CASE

Defendant Edgar Gillock is a former Tennessee State Senator who was serving in the Legislature at the time of trial. In addition to his part-time duties as a legislator, defendant Gillock practiced law in Memphis, Tennessee.

Defendant Allan Bibby is a former employee of Honeywell Information Systems, Inc. At all times pertinent to this prosecution, he served as vice president of Honeywell's operations in the northern region of the United States which included Memphis and Nashville.

Defendant Arthur Ayers is also a former Honeywell employee. Until June 30, 1981, he served as financing marketing manager for the company's southern region. Both Ayers and Bibby were based in Honeywell's Atlanta office.

From 1975 until June of 1977, unindicted co-conspirator Jack Owen served as manager for the midsouth branch of Honeywell's operations. Both Memphis and Nashville were included with the midsouth branch's territory. From July of 1977 until July of 1978 when defendant Bibby terminated him for failure to adequately keep expense reports, Owen served as Honeywell's district director. The southeast district did not include Memphis and Nashville.

Unindicted co-conspirator Robert Grapp is a former Honeywell employee who left the company and formed Public Systems Incorporated, a computer consultant to state and local governments. Grapp was convicted of conspiracy and fraud in an unrelated case prior to this trial.

Unindicted co-conspirator Oliver Drew served as a Honeywell sales repre-

sentative in the Memphis area from January of 1975 until December of 1977 when he was promoted to the position of senior marketing representative and public sector marketing manager.

Unindicted co-conspirator Jack Joseph Camarda is a former Honeywell employee who left the company in August of 1976 to form Financial Marketing Services. Financial Marketing Services was an Atlanta based company offering third-party financing to prospective purchasers of computer equipment.

At issue at trial was the role played by defendant Gillock in two (2) government contracts secured by Honeywell in Tennessee.

In 1976, the State of Tennessee purchased from Honeywell a computer system to service the Department of Employment Security. The State made the purchase

through its competitive bidding procedure which entails review by a legislative committee. Defendant Gillock exercised no authority over the choice of bids nor did he sit on the legislative committee which oversaw the bidding process.

In 1978, Shelby County purchased a package from Honeywell to update the county's computer system installed in 1975 and also purchased from Honeywell. The county financed this purchase through Financial Marketing Services. The County's governing body, the Quarterly Court, approved the purchase and financing arrangements. Again, defendant Gillock exercised no authority in the decision to purchase additional Honeywell equipment.

In the case before this Court, the twenty (20) count indictment, dated June 24, 1982, named three (3) defendants, Edgar Hardin Gillock, A. Arthur Ayers, and Allan

Harvey Bibby. Count I of the Indictment listed twenty-five (25) factual allegations. Section B of Count I charged the three (3) defendants with conspiracy to commit offenses against the United States, specifically with conspiracy to violate 18 U.S.C. §§1341 and 1343. The conspiracy charge stemmed from an alleged violation of 18 U.S.C. §371. According to Section C of Count I, the three (3) defendants and unnamed co-conspirators agreed "to profit financially by defrauding Honeywell Information Systems, Inc. of the corporation's right to the honest, loyal and faithful performance of its employees' services." Defendants Ayers and Bibby and other co-conspirators employed by Honeywell allegedly used their positions within the corporation to divert Honeywell funds through third-party companies to themselves and persons outside Honeywell, including

defendant Gillock. Section C further alleged that defendant Gillock would use his official position and influence as a state senator to obtain contracts for Honeywell with Shelby County, Tennessee, and the State of Tennessee. Section D of the indictment listed eighty-seven (87) overt acts allegedly committed by the three (3) defendants and unnamed co-conspirators in furtherance of the conspiracy.

Count II of the indictment charged the three (3) defendants with the violation of 18 U.S.C. §§1341 and 2. In furtherance of the alleged scheme to defraud Honeywell, the State of Tennessee and its citizens, and the County of Shelby and its citizens, the three (3) defendants allegedly caused a three thousand dollar ($3,000.00) check to be delivered by the United States Postal Service from ManMark, Inc. in Dallas, Texas to defendant Gillock in Memphis, Tennessee.

Count II listed sixteen (16) factual allegations in support of this mail fraud and aiding and abetting charge. Counts III, IV, V, VII, and VIII charged the three (3) defendants with five (5) separate violations of 18 U.S.C. §§1341 and 2 for allegedly causing five (5) checks for three thousand dollars ($3,000.00) each to be delivered on five (5) separate occasions by the United States Postal Service from ManMark, Inc. in Dallas, Texas, to defendant Gillock in Memphis, Tennessee.

Count VI of the indictment charged the three (3) defendants with the violation of 18 U.S.C. §§1343 and 2. In furtherance of the alleged scheme to defraud, the three (3) defendants allegedly caused a telephone conversation to be transmitted in interstate commerce between unindicted co-conspirator, Jack Camarda, in Atlanta, Georgia, and de-

fendant Gillock in Memphis, Tennessee, on August 29, 1978. Count IX charged the three (3) defendants with a second violation of 18 U.S.C. §§1343 and 2 by causing a telephone conversation to be transmitted in interstate commerce between defendant Gillock in Memphis, Tennessee, and unindicted co-conspirator, Oliver Drew, in Atlanta, Georgia, on October 19, 1978.

Counts X, XI, XII, XIII, XIV, XV, and XVI charged defendant Gillock with seven (7) separate violations of 18 U.S.C. §1951. Count XVI, in particular, accused defendant Gillock of knowingly and willfully attempting to affect commerce by extortion by attempting to obtain and by attaining property from Honeywell employees in the amount of $130,365.61. Defendant Gillock allegedly obtained the monies by wrongfully inducing the Honeywell employees' consent

under color of his official right as a state senator.

Counts XVII, XVIII, XIX and XX of the indictment charged defendant Gillock with various violations of Title 26 of the United States Code. Count XVII specifically accused defendant Gillock of willfully and knowingly attempting to evade federal income taxes due for 1978 in violation of Title 26 U.S.C. §7201. Defendant Gillock allegedly filed a false income tax return listing taxable income as $37,266.00 and tax due as $7,630.00 when he allegedly knew that his income for 1978 totalled approximately $168,390.61 with a income tax due of $63,100.00.

On June 30, 1982, defendant Gillock pled not guilty to the charges.

Counsel for defendant Gillock filed various motions and a request on his behalf on

July 29, 1982. The following motions bear upon the Questions Presented for Review: (1) a motion for preliminary independent determination of the admissibility of alleged co-conspirators' statements and order for structuring proof which was denied in a hearing held September 10th; (2) a motion to require the government to give notice of hearsay sought to be introduced which was denied in the September 10th hearing; (3) a motion for severance from co-defendants which was overruled on August 5, 1982; (4) a motion for separate trial on Counts XVII through XX which was denied in the September 10th hearing.

Jury trial in the case before this Court began on October 12, 1982, with District Judge Robert McRae presiding.

On November 10, 1982, the jury returned a verdict of guilty as to Counts I, II, III, IV, V, VI, VII, VIII, IX, XVI and XVII and not

guilty as to Counts XVIII, XIX and XX. The jury declared a mistrial as to Counts X, XI, XII, XIII, XIV and XV.

Counsel for defendant Gillock filed a notice of appeal on November 19, 1982.

On December 13, 1982, the Court held a sentencing hearing. It handed down a sentence of four (4) years to run concurrently on Counts I, II, III, IV, V, VI, VII, VIII, IX and XVI, plus a sentence of three (3) years to run consecutively on Count XVII. The Court also imposed a $10,000.00 fine and dismissed Counts X, XI, XIII, XIV and XV.

The Court of Appeals consolidated the appeals of Gillock, Ayers and Bibby. After briefing and oral arguments, the Sixth Circuit remanded the case to the district court to make the necessary findings under United States v. Enright, 579 F.2d 980 (6th Cir. 1978). After a hearing, District Judge Robert McRae entered an order finding that all co-

conspirator hearsay evidence was properly admitted under Enright.

In an opinion dated January 14, 1985, the Court of Appeals reversed Gillock's conspiracy conviction and one wire fraud conviction. His sentence remained unchanged.

H. ARGUMENT

According to Rule 17 of the Rules of the United States Supreme Court, the following list indicates the character of reasons that will be considered in granting a review on certiorari:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in con-

flict with applicable decisions of this Court.

The petitioner respectfully insists that the case before this Court satisfies the requirements of subsections (a) and (c) in the following three respects.

(1) Misjoinder in the case before this Court requires reversal of defendant Gillock's convictions.

(a) Joinder of offenses. -

Rule 8(a) of the Federal Rules of Criminal Procedure provides:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Under Rule 8(a), joinder of offenses is permissive only. United States v. Rabbitt, 583 F.2d 1014, 1021 (8th Cir. 1978), cert.

denied, 439 U.S. 1116 (1979).

The Court of Appeals in the case before this Court determined that Counts XVIII through XX were improperly joined under Rule 8(a) with the remaining counts. Opinion at 7. The Court, however, determined that the misjoinder constituted harmless error. Opinion at 7-8.

Rule 8(a) authorizes joinder of offenses against a defendant if one of three tests is met. First, offenses may be joined if they are based on the "same act or transaction". Second, offenses may be joined if they are grounded on "two or more acts or transactions connected together or constituting part of a common scheme or plan". Third, offenses may be joined if they are "of the same or similar character". 1 C. Wright, Federal Practice and Procedure §143 (1982).

Application of Rule 8(a) involves the balancing of two conflicting interests; efficiency in the operation of the federal

judicial system versus the right of an accused to a fair trial free of substantial prejudice to that right caused by the joinder of offenses. Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948).

Joinder of the counts exposed defendant Gillock to a great risk of prejudice to his right to a fair trial. The evidence presented by the Government at trial was confusing and complex. As the Seventh Circuit remarked in United States v. Quinn, the jury in a complex and confusing case faces a difficult task in separating proof relevant to different counts. 365 F.2d 256, 265-266 (7th Cir. 1966).

(b) Joinder of defendants.-

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> (b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense

> or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

In the case before this Court, the Court of Appeals found that Counts XVIII through XX were improperly joined as to Bibby and Ayers under Rule 8(b). Although the Court of Appeals reversed Gillock's conspiracy conviction, it did not address his claim of misjoinder under Rule 8(b).

Rule 8(b) allows joinder of defendants if the defendants allegedly participated in (1) "the same act or transaction constituting an offense or offenses" or (2) "the same series of acts or transactions constituting an offense or offenses." 1 C. Wright, Federal Practice and Procedure §144 (1982).

Rule 8(b) does not define what is meant by the phrase "the same series of acts or transactions". The various circuits have defined the phrase in various ways. Accord-

ing to the Fourth Circuit, the phrase includes transactions connected in time, place, and manner so as to constitute a common scheme or plan. United States v. Santoni, 585 F.2d 667, 673 (4th Cir. 1978), cert. denied, 440 U.S. 910 (1979). The Seventh Circuit has defined the test as the existence of a common plan which in turn depends on factors such as whether the transactions occur in the same place within a short time period and utilizing the same modus operandi. United States v. Scott, 413 F.2d 932, 935 (7th Cir. 1969), cert. denied, 396 U.S. 1006 (1970). The case at bar involved unrelated transactions differing in time, place and manner.

The First Circuit defines the term "series" in relation to the benefits derived from joinder:

> Rule 8(b) is not limited to situations in which proof of the other criminal transaction would be

> admissible in a separate trial. It goes beyond, to others, the excuse being the benefit to the court. But to offset the prejudice where multiple defendants are being joined even though they did not engage in a joint act, such as conspiracy, . . . this possibility of benefit should explicitly appear from the indictment or from other representations by the government before trial. Classic examples of such a benefit are when there is an overlapping of issues, as, for example, when some defendants are charged with transporting stolen goods in interstate commerce, and others are charged with receiving the goods, so stolen and transported . . . or when defendants are charged with conspiracy to conceal a crime that part of their number are charged with committing. * * * Where, however, there are no presumptive benefits from joint proof of facts relevant to all the acts or transactions, there is no "series," Rule 8(b) comes to an end, and joinder is impermissible. (citations and footnote omitted).

King v. United States, 355 F.2d 700, 704 (1st Cir. 1966). The Fifth Circuit has held that a "substantial identity of facts or participants" satisfies the "series" requirement of Rule 8(b). See, e.g., United States v. Welch, 656 F.2d 1039, 1049 (5th Cir. 1981),

cert. denied, 456 U.S. 915 (1982). In the instant case, the facts as well as the participants varied from transaction to transaction.

In addition to the confusion surrounding the "series" requirement. Rule 8(b) does not expressly state to what extent each defendant must have "participated" in the series of acts. 1 C. Wright, Federal Practice and Procedure §144 (1982). In the Eighth Circuit's estimation, acts must be part of one overall plan about which all defendants knew and in which all defendants participated in order to be part of the "same series of acts or transactions". United States v. Bledsoe, 674 F.2d 647, 656 (8th Cir. 1982), cert. denied, 459 U.S. 1040 (1982).

According to the Ninth Circuit, the Government may not escape Rule 8(b)'s requirement merely by adding a conspiracy count

to link the defendants together. Rather, the Government must put forth the conspiracy charge in good faith. United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971). In Williamson v. United States, the Ninth Circuit noted that the Government cannot join factually unrelated charges against some but not all of the defendants simply because the indictment charges all of the defendants with conspiracy in another count. 310 F.2d 192, 197 n. 16 (9th Cir. 1962). The instant case is a good illustration of this type of improper joinder.

The Government cannot join separate and distinct conspiracies and prosecute them as a single conspiracy. 1 C. Wright, Federal Practice and Procedure §144 (1982). The Fourth Circuit in United States v. Goss, determined that where an indictment charged one conspiracy but the evidence showed a series of separate, unconnected conspiracies,

the variance required the convictions to be set aside. In the Goss case, the episodes shown were far apart and involved different people. 329 F.2d 180, 182-83 (4th Cir. 1964). As the Court of Appeals acknoweldged, the Government proved, in the case at bar, several unrelated transactions, rather than one (1) overall conspiracy involving Edgar Gillock.

(c) The appropriate remedy for misjoinder.

Prior to the case before this Court, the Sixth Circuit addressed the question of the appropriate remedy where joinder is improper. In the case of United States v. Hatcher, the Sixth Circuit determined that the trial court has no discretion to deny a motion for severance where there has been misjoinder. 680 F.2d 438, 441-42 (6th Cir. 1982).

The Sixth Circuit panel opinion in the

case before this Court concluded that the misjoinder of Counts XVIII-XX was harmless error. In support of its ruling, the panel reviewed several cases decided under Rules 8 and 14 of the Federal Rules of Criminal Procedure.

In United States v. Kopituk, 690 F.2d 1289 (11th Cir. 1982), the Eleventh Circuit addressed severance issues in the context of tax counts and non-tax counts joined as part of a series of acts or transactions arising from the conspiracy and criminal enterprise charged in the indictments and established at trial. The appellate court approved of the joinder because the tax offenses were part of a series of acts committed in furtherance of the conspiracy. The Court noted that misjoinder is inherently prejudicial and that severance for misjoinder is mandatory. Id. at 1314.

Again, in United States v. Kenny, 645

F.2d 1323 (9th Cir.), cert. denied, 454 U.S. 828 (1981), the Court addressed severance issues in the context of an accompanying conviction for conspiracy which the Court upheld. Id. at 1344-46.

As the panel notes, the remedy for misjoinder under Rule 8 has traditionally been automatic reversal. Opinion at 7 citing United States v. Reynolds, 489 F.2d 4, 6 (6th Cir. 1973), cert. denied, 416 U.S. 988 (1974) and Ingram v. United States, 272 F.2d 567, 570 (4th Cir. 1959).

The panel opinion cites three cases in support of the proposition that misjoinder may constitute harmless error and, therefore, in limited circumstances, misjoinder may not require reveral. Opinion at 7. The Second Circuit in United States v. Halper, 590 F.2d 422 (2nd Cir. 1979), acknowledged that there are cases in which the courts have found misjoinder to be harmless error. However,

the Second Circuit stated, "[W]e can find errors such as these harmless only if 'our conviction is sure that the error did not influence the jury or had but very slight effect.'" Id. at 432-33, citing United States v. Quinto, 582 F.2d 224, 235 (2d Cir. 1978). The Second Circuit could not draw the conclusion in the Halper case and reversed and remanded the case for new and separate trials. Id.

While the appellate court in United States v. Martin, 567 F.2d 849 (9th Cir. 1977), determined that joinder was improper, it concluded that the error was harmless. The Court reviewed and upheld convictions for conspiring in various drug related offenses. Among the considerations weighing in favor of harmless error was the preponderance of overwhelming evidence introduced at trial concerning joint activity and involvement in a drug ring.

The Sixth Circuit reversed and remanded a conviction due in part to misjoinder in United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982). The Sixth Circuit stated, "When misjoinder occurs severance is mandatory and failure to sever is error." Id. at 442. Only by application of Rule 52 of the Federal Rules of Criminal Procedure could the Sixth Circuit take cognizance of the government's argument that the improperly joined defendant suffered no prejudice. In a tentative, cautious treatment of the harmless error rule, the Sixth Circuit mentioned an instance in which the rule could apply to misjoinder: when evidence of the improperly joined offense would have been admissible to prove properly joined offenses. Prejudice results if the extent of proof of the improperly joined offenses is greater than the proof used to show other crimes or if the improperly joined offenses shifts the focus of the trial away from the properly joined

offense. Id.

In United States v. Goldfarb, 643 F.2d 422 (6th Cir.), cert. denied, 454 U.S. 827 (1981), the district court denied severance under Rule 14 of a corporate defendant from individual co-defendants. The corporate defendant argued that it could not defend itself except through the co-defendants who were its alleged agent and they, in turn, had countervailing Fifth Amendment rights. The Sixth Circuit rejected the argument because the corporate defendant did not call other officers, agents, and employees who were not defendants, yet participated in the conspiracy, to testify in its behalf. Id. at 435. Thus, the corporate defendant did not carry its burden by establishing abuse of discretion by the trial court.

In the appeal to the Sixth Circuit, counsel for Gillock assigned as error misjoinder of defendants and misjoinder

of offenses. Reversal of Gillock's conspiracy conviction illustrates the danger of joining numerous defendants and offenses together connected by an alleged conspiracy. The government failed to link Gillock to the conspiracy alleged in the indictment; however, hearsay testimony of co-conspirators and the cumulative effect of offenses alleged undoubtedly contributed to, and were responsible for, the remaining convictions. Neither the Halper case nor the Hatcher case advocates widespread application of the harmless error rule in instances of misjoinder. The panel opinion, in effect, changed the rule long recognized in the Sixth Circuit.

The issue of appropriate remedy for misjoinder is currently before the Supreme Court in the case of United States v. Lane, NO. 84-744. The Court of Appeals' decision may be found at United States v. Lane, 735

F.2d 799 (5th Cir. 1984). In contrast to the Sixth Circuit, the Fifth Circuit has held that misjoinder always requires reversal of a conviction. The First, Third, Eighth, Tenth and Eleventh Circuits join the Fifth. The Second, Fourth, Seventh, Ninth and D.C. Circuits side with the Sixth Circuit on the issue of the proper remedy for misjoinder.

(2) The Sixth Circuit's decision in the case before this Court conflicts with the Eighth Circuit's ruling in United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979).

At trial and on appeal, counsel for defendant Gillock relied on the case of United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979), in support of reversal of Gillock's Hobbs Act, mail fraud, and wire fraud convictions.

(a) The mail and wire fraud con-

victions.-

Section 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 1343 echoes Section 1341 in all material respects.

In the case at bar, the Government presented no evidence to support the contention that defendant Gillock participated

in a scheme to defraud Honeywell or aided and abetted such a scheme.

In United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 479 U.S. 1116 (1979), the Court addressed factual circumstances almost identical to the facts in the case before this Court.

In the Rabbitt case, the indictment charged the defendant with a violation of various federal laws, including 18 U.S.C. §1341. The defendant, Robert Rabbitt, was an attorney and a long time member of the Missouri House of Representatives, who held the position of floor leader for five years and was Speaker of the Missouri House of Representatives during the time various offenses charged allegedly occurred. He offered, for a ten percent (10%) fee from any resulting work, to introduce an architectural firm to people in state and local government who might be able to secure contracts for the firm. When the firm

succeeded in obtaining projects, it reimbursed the defendant for his assistance in the form of retainer fees to the defendant's law firm. The mailings of law firm retainer bills and checks in payment constituted the mail fraud charges against the defendant. Id. at 1020-21.

At page 1024 of the Rabbitt decision, the Eighth Circuit held:

> The concept of fraud upon the public may clearly fall within the ambit of the mail fraud statute where dishonest conduct by a public official directly implicates the functions and duties of that official's public office. Whether a showing of dishonesty on the part of a state official, outside his official duties, with no financial loss to the state constitutes a fraud upon the public and thereby is statutory mail fraud is, in our judgment, highly questionable. Every breach of public trust and malfeasance in office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud statute.

The Court at page 1025 stated as follows:

> The indictment charges, in essence, that Rabbitt defrauded the citizens of Missouri by accepting a ten percent commission on architectural contracts awarded to the Berger-Field firm and concealing or failing to disclose his interest in those contracts.

The Court noted that this conduct may be unethical, and in violation of canons as an attorney. In addition, such conduct may violate a candidate disclosure statute or violate a state statute as to partiality or abuse by a public official. However, the Court stated:

> But such violations, although bearing on intent to defraud, do not in and of themselves establish the substantive crime of mail fraud under 18 U.S.C. §1341.

Although in several cases, the courts relied on various combinations to establish a scheme to defraud, the Eighth Circuit distinguished these cases on the basis that they involved conduct which deprived the public of potential tangible gain, or of its

right to honest and fair dealing by the officer in question, or of its right to disclosure of the officer's interest in the transaction. Id. at 1025.

> We find none of these factors present in this case. The state officials who awarded architectural contracts did so on merit. There is no evidence that Rabbitt's use of his friendship, position, and influence to aid Berger-Field in obtaining contracts resulted in inferior work, greater expense, or any other tangible loss to the citizens or state.
>
> We also find no evidence that Rabbitt's conduct deprived the citizens of their right to honesty and fairness in the conduct of his official duties. Rabbitt did not, in his official capacity, control the awarding of state contracts to architects. There is no evidence that Rabbitt failed to carry out the duties and responsibilities of his legislative office or leadership positions for the sake of Berger-Field. Id. at 1026.

The Court went on further to say:

> To affirm the convictions on the Berger-Field mail fraud counts would mean expansion of the statute beyond its application in prior political

> corruption cases. This we refuse to do. We hold that Rabbitt's motion for judgment of acquittal on mail fraud counts I through X should have been granted. Accordingly, we reverse his convictions on those counts.

Subsequent to the Rabbitt case, the United States Court of Appeals for the Second Circuit in the case of United States v. Von Barta, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981) faced a similar situation. The Second Circuit acknowledged that the mail fraud statute encompasses schemes to deprive an employer of an employee's honest and faithful services provided the employee is under a duty to reveal material information. The Court made the following observation:

> Similarly, in United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978), cert. denied, 439 U.S. 1116, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979), the Eighth Circuit reversed the mail fraud conviction of a state legislator who aided an architectural firm in obtaining state contracts. Rabbitt's reward for his services was

> a commission of ten percent based on the work he diverted to the firm. Although Rabbitt violated the canons of legal ethics, a statute requiring candidates for state office to disclose their sources of income, and possibly a state provision outlawing 'partiality' or abuse of public office, his unscrupulous conduct was held not to violate §1341. Significantly, one reason was that Rabbitt, as a state official, was under no affirmative duty to disclose his interest in the firm.

Id. at 1006.

In the instant case, testimony at trial proved that both the State and County received good deals on their Honeywell purchases and that Honeywell benefited also.

(b) The Hobbs Act conviction.-

Section 1951 provides as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires to do so, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years

or both.

(b) As used in this section -

(2) The term "extortion" means the obtaining or property from another, with his consent induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such state; and all other commerce over which the United States has jurisdiction.

In the Rabbitt decision, the Eighth Circuit set aside the conviction of a state senator under one (1) count charging a violation of the Hobbs Act. The defendant in Rabbitt introduced an architectural firm to the Chief of Design and Construction for the State of Missouri, the State Director of Prisons, the State Director of Planning and

Construction, and a St. Louis alderman. In return, the firm paid the defendant a ten percent (10%) fee for projects received through the defendant's contacts. Id. at 1020.

The Eighth Circuit held:

> In the present case, the Government does not contend that Rabbitt possessed actual power to award contracts for architectural services within his legislative powers or that Rabbitt possessed the apparent power to award contracts and that Berger-Field believed in Rabbitt's power to secure contracts for the firm.

The evidence in Rabbitt, therefore, did not support the Government's argument. Id. at 1028.

The Government, in the case before this Court, did not allege in the indictment nor did the prosecution produce any witness who stated that he or she believed that defendant Gillock possessed the power to award contracts for computer or computer-related systems.

The Court stated at page 1028 of the Rabbitt decision:

> Each architect knew the most Rabbitt could do was recommend them to state contractors as qualified architects and thereby gain them a friendly ear. Moreover, while Rabbitt's influence obviously helped these architects obtain state jobs, no testimony established that any state contracting officer awarded any contract to Berger-Field because of Rabbitt's influence or that Berger-Field believed Rabbitt's introduction was enough to secure the work. The Government failed to prove Berger-Field entertained a reasonable belief Rabbitt possessed effective control over the award of architectural contracts necessary to establish extortion 'under color of official right' in violation of the Hobbs Act.

The indictment against Gillock is, in all material respects, identical with the Rabbitt case. Neither the indictment nor testimony at trial included any statement or allegation that any person or persons had any basis or reason to believe that the defendant Gillock had effective control over the award of computer contracts. There was no such

allegation; there was no testimony to that effect.

The Sixth Circuit panel relies upon United States v. Mazzei, 521 F.2d 639 (3d Cir.) (en banc), cert. denied, 423 U.S. 1014 (1975), in support of Gillock's Hobbs Act conviction. The Mazzei case, however, differs in several important respects from the case before this Court. In Mazzei, the secretary-treasurer of the corporate victim of the alleged extortion testified that he believed in the defendant's power over state leases. Id. 643. Furthermore, the evidence introduced at trial confirmed the defendant's "ability to initiate state inspection of the premises, to specify rental rates that would be and were acceptable to the state, and to alter [the corporation's] proposal on the second lease." Id. at 644. During negotiations, the defendant displayed intimate knowledge to the corporation's

secretary-treasurer of the decision making process in the granting of state leases. Id.

Although the Mazzei case is distinguishable, the Rabbitt opinion is directly on point in the case before this Court. The panel makes no attempt to reconcile its holding with the Rabbitt decision. As a result, conduct which is criminal under the Hobbs Act if committed in Tennessee, is not criminal in Missouri. The panel's decision, particularly in view of the conflict among the circuits, has potential far-reaching effects on the political process and those officials who participate in the process. Due to the conflict among the Circuits, the Supreme Court should grant certiorari on this issue as well as the issue of misjoinder already on certiorari.

(3) Reversal of the conspiracy conviction in the case before this Court re-

quires reversal of remaining convictions which were based, in large part, on hearsay statements erroneously admitted under FRE 801(d)(2)(E).

It has long been recognized that the statements of a co-conspirator made during the course of and in furtherance of a conspiracy are admissible against other alleged co-conspirators. This rule is embodied within the Federal Rules of Evidence at Rule 801(d)(2)(E) which provides that such statements are not hearsay and are, therefore, admissible. However, not all statements offered during a conspiracy trial are co-conspirators' statements. The trial court should evaluate proffered statements in order to separate admissible from inadmissible statements.

Rule 104 of the Federal Rules of Evidence requires the court to make a preliminary determination of the sufficiency of the

independent evidence before any co-conspirator statements are admitted into evidence. Since adoption of the Federal Rules of Evidence, many of the circuits have had an opportunity to re-evaluate the requisite elements necessary to admit a statement as that of a co-conspirator under Rule 801(d)(2)(E) and the standard of proof to be followed.

In United States v. Petrozziello, 548 F.2d 20, 22 (1st Cir. 1977), the First Circuit expressly held that the Federal Rules of Evidence require questions of admissibility to the resolved by the court. The First Circuit addressed the standard to be employed:

> The new rules, by eliminating the jury's role, place a greater burden on the judge, for his decision is now conclusive. In years past, this circuit has followed the general rule that a judge should admit hearsay against the defendant if the judge finds enough independent, non-hearsay evidence to make a prima facie case of conspiracy . . . This standard makes sense when the jury has the last word; the judge should

refuse to admit a co-conspirator's hearsay only when no reasonable jury could find that there was a conspiracy. But rule 104(a) requires that questions of admissibility be "determined" by the judge, and finding a prima facie case is not the same as "determining" that a conspiracy existed. A higher standard is implicit in the judge's new role.

Other changes in the rules also suggest a higher standard. The new rules permit a trial judge to base his "determination" on hearsay and other inadmissible evidence . . . Continued reliance on a prima facie standard will either broaden the co-conspirator exception unconscionably or plunge the courts into metaphysical speculation about how a prima facie case can be built on inadmissible evidence.

Although the prima facie standard is no longer appropriate, we see no reason to require that the conspiracy be provided beyond a reasonable doubt. That is the standard the jury will apply to the evidence as a whole. The judge is ruling on admissibility, not guilt or innocence; the government's burden need not be so great . . . The ordinary standard is sufficient; if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy, the hearsay is

admissible.

548 F.2d at 23. [Citations and footnotes omitted.]

The Sixth Circuit followed suit in adopting the preponderance of evidence standard. In United States v. Enright, the court abandoned the prima facie rule and adopted the reasoning and holding of Petrozziello. 579 F.2d 980 (6th Cir. 1978). The court specifically discussed the question of whether Federal Rule of Evidence 104(a) or 104(b) governs the court's determination on the admissibility of co-conspirator statements. Noting that Rule 104 is ambiguous, the court concluded that "a fair reading of subsections (a) and (b) favors the construction that 104(a) should be applicable to the question of admissibility of a co-conspirator's statement. 579 F.2d at 984. After deciding that the determination must be made under Rule 104(a), the court held

that the issue for the trial judge's decision is more demanding than a prima facie test and calls for the exercise of judicial fact-finding responsibilities which require the trial judge to evaluate both credibility and the weight of the evidence. 579 F.2d at 985.

The court noted that retention of the prima facie standard under Rule 104(a) would unduly broaden the co-conspirator exception; moreover, the court held that a preponderance rather than a prima facie standard must be applied. 579 F.2d at 986.

The trial court, in the case before this Court, should have required independent proof of any co-conspirator's statement prior to its admission. A significant case dealing with this issue is the en banc decision of the Fifth Circuit in United States v. James, 590 F.2d 575 (5th Cir. 1979). The James court developed at great length the

importance of the trial court in making the admissibility determination and the standards that the court should follow. In addition, the court of appeals went further and outlined the preferred order of proof in cases involving alleged co-conspirator's statements.

Recognizing the inherent danger in the admission of hearsay in anticipation of a later showing of a conspiracy which never materializes, the court noted:

> The District Court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a co-conspirator. If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.

590 F.2d 582.

Thus, the Fifth Circuit held that structured proof should be the rule ab-

sent a showing of impracticality.

In the instant case, the Government chose to prosecute only the three (3) named defendants despite the fact that the indictment referred to several alleged co-conspirators. If the Government intended to offer any statements of a co-conspirator which would otherwise be considered hearsay, the trial court should have ordered the Government to structure its proof to establish the necessary prerequisites to admissibility prior to the proffer of the statements themselves. The Fifth Circuit in James recognized the power and duty to enter such an order; furthermore, Federal Rule of Evidence 611(a) expressly sets forth this power and duty. Therefore, the trial court erred in its refusal to make a preliminary determination of the admissibility of the alleged co-conspirators' statements and its refusal to order the structuring of proof.

Because the trial court failed to make the required Enright determination, the Sixth Circuit remanded the case to the district court pursuant to United States v. Holloway, 731 F.2d 378 (6th Cir. 1984), for the lower court to make the finding. Although the district court purportedly made the Enright finding after a hearing, the panel opinion reversed Gillock's conspiracy conviction stating that the main conspiracy was "to defraud Honeywell of the honest, loyal, and faithful performance of its employees," with the core of the conspiracy the arrangement between Bibby, Ayers and Camarda. Opinion at 10.

Based on the trial court's erroneous finding that Gillock was a member of the conspiracy, the trial court admitted much hearsay evidence under Rule 801(d)(2)(E). For example, Grapp testified that Owen called stating that he needed to pay Gillock some

money. Owen further asked Grapp if Grapp would use his company, P.S.I., as a conduit for payments. Drew testified concerning alleged conversations with his Honeywell superiors on the Shelby County contract. Camarda testified that he, Bibby and Ayers agreed to pay Gillock $150,000.00 for his help with the Shelby County contract. According to Camarda, Drew or Ayers stated that Gillock's assistance was necessary to "unclog" the Shelby County transaction. Camarda testified that Drew told him who to make the $130,000.00 check to in payment of Gillock's alleged services.

Without this hearsay testimony, the government's case against Gillock on the remaining counts would have been considerably weakened, if not completely destroyed. As the panel opinion states:

> A substantial amount of evidence was introduced at trial detailing the Bibby/Ayers/Camarda profit-splitting arrangement, evidence that would not

> have been admissible in a separate trial on the Shelby County contract alone. Opinion at 11-12.

The jury heard evidence of multiple conspiracies not charged in the indictment.

Even though the panel reversed Gillock's conspiracy conviction, nevertheless, it permitted the admission of hearsay evidence to stand.

Not only did the district court fail to follow the proper procedure before admitting hearsay evidence, but, after the fact, the trial court erroneously entered a finding of conspiracy. Under the circumstances, the Court of Appeals should have reversed Gillock's convictions.

At any rate, the Supreme Court, pursuant to Rule 17, should grant certiorari on this issue to determine the appropriate remedy under such circumstances.

For the foregoing reasons, the de-

fendant respectfully requests this Court to grant his petition in this cause for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to hear and decide his case on oral argument and briefs.

Respectfully submitted,

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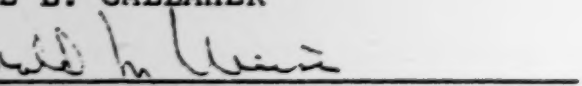
BY: 
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May, 1985

CERTIFICATE OF SERVICE

I, Arnold M. Weiss, Attorney for Petitioner, hereby certify that I have this 24 day of May, 1985, pursuant to Rule 28 of the Supreme Court Rules, caused to be served upon The Honorable W. Hickman Ewing, United States Attorney, Federal Building, Memphis, Tennessee 38103; Mr. Henry L. Klein, Attorney for Allen Bibby, 770 Estate, Memphis, Tennessee 38119; Mr. Andrew Ekonomou, Attorney for A. Arthur Ayers, Suite 515, Rhodes-Haverty Building, 134 Peachtree Street, N.W., Atlanta, Georgia 30303; and Mr. John Hehman, Clerk, United States Court of Appeals for the Sixth Circuit, U.S. Post Office and Courthouse Building, Cincinnati, Ohio 45202; Solicitor General, Department of Justice,

Washington, D.C. 20530; The Honorable Robert M. McRae, Judge, United States District Court for the Western District of Tennessee, 1107 Federal Building, 167 North Main Street, Memphis, Tennessee 38103; copies of the foregoing Petition for Writ of Certiorari filed by Edgar Hardin Gillock by placing copies of the same in the United States mail, properly addressed, and with sufficient postage affixed thereto.